

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

Assigned of Briefs December 3, 2009

MIN GONG v. IDA L. POYNTER

Appeal from the Circuit Court for Montgomery County
No. MCCCCVOD081186 Ross H. Hicks, Judge

No. M2009-00811-COA-R3-CV - Filed January 28, 2010

Min Gong (“the plaintiff”) filed this action against Ida L. Poynter (“the defendant”) for injuries she sustained when, as a pedestrian on the sidewalk, she was struck by an automobile driven by the defendant, all as alleged in her filing. The “complaint” was filed pro se in the form of a long letter with approximately 200 pages of accompanying documents. The defendant served written discovery on the plaintiff consisting of six interrogatories and one document request. The plaintiff submitted an unsworn response in which she objected to answering the defendant’s discovery on the grounds that “individuals” are not subject to written discovery and that the information requested was protected by the attorney-client privilege or the work product doctrine. The defendant filed a motion to compel which the trial court granted after a hearing held on January 29, 2009. The order, filed January 29, 2009, compelled “the Plaintiff [to] submit written responses to Defendant’s discovery within thirty (30) days from the date of this Order or Plaintiff’s suit will be dismissed.” The plaintiff did not appear at the January 29, 2009, hearing, but did file several “motions” of her own. In addition, she sent written notification that she had scheduled the matter for a four-hour trial on April 2, 2009. As to the motion to compel, the plaintiff asserted that the defendant had misinterpreted “Rule 33 of the Tennessee Rules of Civil Procedure” and that it is not applicable to individuals. Counsel for the defendant filed an affidavit on March 11, 2009, stating that the plaintiff had not complied with the order and that the plaintiff, as late as March 9, 2009, continued to resist discovery on the grounds previously stated by her. On March 25, 2009, the trial court entered an order dismissing the case “without prejudice.” The plaintiff appeals. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court
Affirmed; Case Remanded

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which D. MICHAEL SWINEY and JOHN W. MCCLARTY, JJ., joined.

Min Gong, Indianapolis, Indiana, appellant, pro se.

David B. Brogdon, Dickson, Tennessee, for the appellee, Ida L. Poynter

OPINION

I.

As stated, this case involves a pedestrian's claim against the driver of a car that allegedly struck the plaintiff on the sidewalk. The plaintiff disclaims any permanent injury, but demands almost \$600,000 in her complaint. According to the voluminous attachments to the complaint, the plaintiff was able to retain an attorney to make an informal demand on the driver, but the attorney became unwilling to proceed when the plaintiff was unable to explain how the accident happened.

The plaintiff then filed her complaint pro se on October 14, 2008. Approximately one month later, the defendant propounded written discovery consisting of six interrogatories and one document request. The subject matter of the interrogatories consisted of the (1) name, address, birthdate, driver's license number, and social security number, of the plaintiff, (2) activities during the two hours prior to the incident, (3) name, address, and phone number, of any eyewitnesses, (4) identity of people who came to the scene after the accident, (5) name, address, and phone number, of any medical professionals who have given an opinion that the accident caused the injuries complained of, and (6) description of the defendant's vehicle and how it struck the plaintiff. The document request was for photographs of any injured area of the plaintiff's body. On or about November 24, 2008, the plaintiff provided and filed what purported to be responses to the discovery. In reality, it was an argument, in narrative form, with questions concerning the defendant's comparative fault defense. The only substantive response was a list of potential witnesses with contact information for some of the witnesses. With regard to the interrogatories, the plaintiff stated: "Because Rule 33 is not applicable to individuals, the plaintiff **objects** to answer any and all questions asked in counsel's interrogatories." (Bold and underlining in original). The plaintiff also asserted an objection that the requested material was "privileged (**Attorney-Client and/or Work Product Privilege.**)" (Bold, underlining, and parenthesis in original). As to the one document request, the plaintiff stated, "Documents and tangible things in the plaintiff's possession either belong to legal advice privilege and/or litigation privilege, or are unrelated to the matter of the car incident."

The defendant filed her motion to compel on January 12, 2009, which resulted in the order filed January 29, 2009, giving the plaintiff 30 days from the date of the order to comply. It is clear that the plaintiff knew the motion to compel was to be heard on January 29, 2009. She notified the court on January 20, 2009, that she would not be present at the hearing for the reasons stated in her correspondence to the court dated January 5, 2009, *i.e.*, primarily, that she had arranged an April trial date and that she resided in Indiana and discovery was burdensome to her. In fact, the plaintiff suggested that the court should simply grant a judgment in her favor based on what she viewed to be an insufficient and frivolous defense.

It is clear that the plaintiff was warned that if she did not respond to discovery within the 30 day window, "Plaintiff's suit [would] be dismissed." Plaintiff stood on her objections and did not supplement her responses, all as established in the affidavit of defense counsel filed March 11, 2009. Nevertheless, when the matter came back before the court on March 25, 2009, the court did not dismiss the case with prejudice. Instead, the court explicitly stated that the dismissal was "without prejudice."

Between the filing of the order compelling the plaintiff to answer the defendant's discovery and the entry of the order of dismissal, the plaintiff filed three separate documents in letter form addressed to "Judge Gassaway." The first, filed with the court on February 11, 2009, asserted that "[t]he plaintiff believes that Judge Hicks is prejudiced against her interest." The "motion" did not state the basis for the plaintiff's belief. It did ask that Judge Gassaway "reconsider Judge Hicks' two orders" and consider the record and rule before Judge Hicks could "prejudic[e] the plaintiff's interest." In a similar document filed March 2, 2009, the plaintiff asked "Judge Gassaway . . . to consider several motions" including a motion that the court "dismiss all counsel's unreasonable requests and order counsel to be respectful to the victim." The third filing addressed directly to "Judge Gassaway" was the plaintiff's opposition to the order of dismissal that defense counsel had tendered to the court. The plaintiff's basis for objecting was that she had responded to the discovery requests by asserting privilege and the inapplicability of discovery to individuals. The plaintiff also stated that she had offered to answer "relevant" questions in a deposition which the defendant scheduled and then cancelled. The defendant's basis for the cancellation was that counsel did not want to proceed with the deposition without having the written discovery responses. The plaintiff also asked that counsel be sanctioned for "frivolous motions, . . . excuses, . . . [and] redundant or false answers." The order of dismissal, signed by Judge Hicks, did not directly address the plaintiff's various requests made by the plaintiff of Judge Gassaway, presumably because the court viewed its order as either disposing of the issues raised by the plaintiff or rendering them moot. Plaintiff filed a timely notice of appeal to this court.

II.

The plaintiff asks that we address the following questions:

Did Montgomery County Circuit Court err in dismissing Gong v. Poynter?

Is Gong's appeal different from prior personal injury cases that involved automobile accidents? If so, how different is her claim?

Did Judge Hicks . . . play a harmful role in deciding Gong's claim?

Did trial court clerks' inconsistencies contribute to the dismissal of Gong's claim?

Did the defendant's counsel . . . file frivolous motions and initiate unreasonable requests that have obstructed justice?

What other factors have influenced Gong v. Poynter?

The defendant asserts that the one dispositive issue is whether the trial court erred in dismissing the case for plaintiff's failure to comply with the discovery order.

III.

We will begin by identifying the standard by which we review a trial court's dismissal of a case as a discovery sanction and proceed as necessary through the litany of issues listed by the plaintiff:

That the trial court is expressly authorized to impose the sanction of dismissal is without question. When the trial court exercises its discretion in imposing the sanction of dismissal, the exercise of its discretion will not be disturbed by this Court in the absence of an affirmative showing that the trial judge abused his discretion.

Holt v. Webster, 638 S.W.2d 391, 394 (Tenn. Ct. App. 1982)(citations omitted). Under this standard, a reviewing court is not free to substitute its judgment for the trial court. ***Myint v.***

Allstate Ins. Co., 970 S.W.2d 920, 927 (Tenn. 1998). The trial court must be upheld if reasonable minds can disagree as to the propriety of the trial court's decision. *Bass-Flinn v. Flinn*, 121 S.W.3d 383, 390 (Tenn. Ct. App. 2003). Usually, abuse of discretion is found in conjunction with a misapplication of controlling legal principles or a finding that is against the substantial weight of the evidence. *White v. Vanderbilt Univ.*, 21 S.W.3d 215, 223 (Tenn. Ct. App. 1999).

We recognize that the plaintiff is not an attorney. The law regarding pro se litigants is well-established:

Parties who choose to represent themselves are entitled to fair and equal treatment by the courts. However, the courts may not prejudice the substantive rights of the other parties in order to be "fair" to parties representing themselves. Parties who choose to represent themselves are not excused from complying with the same applicable substantive and procedural law that represented parties must comply with. . . .

Trial courts possess inherent, common-law authority to control their dockets and the proceedings in their courts. Their authority is quite broad and includes the express authority to dismiss cases for failure to prosecute or to comply with the Tennessee Rules of Civil Procedure or the orders of the court.

Hodges v. Attorney General, 43 S.W.3d 918, 920-21 (Tenn. Ct. App. 2000) (citation omitted).

The plaintiff makes the same arguments in this court that she advanced in her filings in the trial court. She argues that she "strictly complied with rules of discovery" because she raised and stood on legitimate objections. She reiterates her objection that interrogatories are "not applicable to individuals" and asserts claims of privilege and work product. She also asserts that dismissal was too harsh a sanction.

There is no doubt that the Tennessee Rules of Civil Procedure, and Rule 33 in particular, provide for discovery of information from individuals.

Any party may serve upon any other party written interrogatories to be answered by the party served or, if the party served is a public or private corporation or a partnership or association or

governmental agency, by any officer or agent, who shall furnish such information as is available to the party.

Tenn. R. Civ. P. 33.01. Plaintiff seems to argue that the mere mention of artificial beings such as corporations, partnerships and governmental agencies as possible parties somehow excludes individuals from being parties. Yet, the plaintiff sued an individual, Ms. Poynter. Thus, it is clear that the plaintiff does not even believe her own argument and is trying to construct an excuse for not answering the interrogatories. The plain and natural meaning of the word “party” is inclusive of “individuals,” and the context clearly shows that where the party is an individual, the individual will answer the interrogatories, whereas if the party is something other than an individual, an individual will answer on behalf of the artificial entity.

The plaintiff gave neither the trial court nor this court any explanation as to why the requested information qualified for a privilege. She appears to labor under the misconception that any information that she shared with her attorney became insulated from discovery. It should go without saying that a client cannot somehow use an attorney as a lockbox to hide away from discovery material and information that he or she possesses. It is the client’s burden to establish that the information sought qualifies for the privilege. *Bryan v. State*, 848 S.W.2d 72, 80 (Tenn. Crim. App. 1992). The plaintiff has not made such a showing in this case.

We recognize that dismissal is harsh, but we do not find it was an abuse of discretion in this case. We have previously noted that while dismissal always seems harsh, appellate courts must not, in their review, deprive trial courts of the ability to penalize parties who violate the rules and to deter parties from disregarding trial court orders. *Holt*, 638 S.W.2d at 394. Dismissal is one of the tools explicitly granted to trial courts. As discussed above, the plaintiff’s objections are totally without merit. The only excuse for the failure to cooperate was the plaintiff’s pro se status. As noted in *Hodges*, 43 S.W.3d at 920-21, pro se status does not excuse non-compliance with the procedural rules and does not prevent a trial court from dismissing an unrepresented party’s case for failure to comply with the rules. Even after the plaintiff knew that she had been ordered to provide information, she stood on her objections instead of supplying the information. The trial court made the dismissal “without prejudice” so as to soften the blow. We hold that the trial court did not abuse its discretion in dismissing the case without prejudice. We also agree with the defendant that this is the dispositive issue in the case. Nevertheless, we will briefly work through the other issues as necessary to demonstrate that there is nothing in the plaintiff’s arguments to alter the disposition made by the trial court or our holding that the trial court did not abuse its discretion.

The plaintiff argues that since she was a pedestrian, this case is unique and cannot be treated as a typical automobile accident case. The defendant disputes whether her car even hit the plaintiff and argues that, if it did, the plaintiff was at fault. Even if the accident happened just as the plaintiff says it did, the defendant was entitled to discovery to allow counsel to evaluate his client's credibility before trial and to evaluate the defendant's liability and the plaintiff's damages. Accordingly, this argument does not militate against the dismissal.

Next, the plaintiff argues that Judge Hicks "played a harmful role" in dismissing the case. It is arguable that, from the perspective of the losing party, any judge who signs an order granting relief to the winning party plays a "harmful role." This is a necessary result of the trial judge's role in our adversary system. We interpret the thrust of the plaintiff's argument to be that the trial judge showed prejudice against her by refusing to rule on her motions and by allowing the defendant to amend its initial answer to raise the plaintiff's comparative fault as a defense. From our review of the record, it is clear that the reason most of the "motions" made by the plaintiff were not ruled on is that the plaintiff did not appear on January 29, 2009, the day they were set for hearing. The plaintiff has nothing other than a bad result to show as prejudice on the part of Judge Hicks. This argument has no merit.

The plaintiff also argues that "trial court clerks' inconsistencies" contributed to the dismissal. We are not convinced. The alleged inconsistencies are delay in preparing the record for appeal and one deputy clerk telling the plaintiff after the filing of the order of dismissal that the case was still on the docket for an April trial. Any problems that arose after the entry of the order of dismissal did not prevent the plaintiff from pursuing her appeal, nor did they cause the trial court to order dismissal. Therefore, there is nothing in this argument to affect our holding.

The plaintiff argues that the defendant achieved this result through "numerous frivolous motions and . . . unreasonable requests." The "requests" that are important for the purpose of this appeal are the six interrogatories and one document request. They are "calculated to lead to the discovery of admissible evidence" and appear imminently reasonable. *See* Tenn. R. Civ. P. 26.02(1). The motion that is important for purposes of this appeal is the motion to compel. In holding that the trial court did not abuse its discretion in dismissing the case, we also meant that the trial court did not abuse its discretion in granting the motion to compel. The only other motion that the plaintiff complains of is the motion to amend the defendant's answer to allege the failure of the plaintiff to exercise due care for her own safety. The plaintiff contends that the allegation is inconsistent with the basic rules of driving. However, the duty placed on a driver does not absolve a pedestrian of all responsibility. Even pedestrians within a marked crosswalk "still must exercise reasonable

care for [their] own safety.” 8 Tennessee Practice, T.P.I.—Civil 5.21 (2009) (citing Tenn. Code Ann. §§ 55-8-134 to 136).

The plaintiff argues that a host of “other factors” influenced the case including the involvement of an insurance company, the malpractice of her attorney and the evaluation of her case by “100 attorneys and law firms.” We have considered these arguments and found nothing in them to require a retreat from our holding that the trial court did not abuse its discretion in dismissing the case because of the plaintiff’s failure to obey the court’s order compelling discovery.

IV.

The judgment of the trial court is affirmed. Costs on appeal are taxed to the appellant, Min Gong. This case is remanded, pursuant to applicable law, for collection of costs assessed below.

CHARLES D. SUSANO, JR., JUDGE